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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

LOLI VICTORIA WANG,
Plaintiff and Appellant,

v.

CITY OF OAKLAND et al.,
Defendant and Respondents.

A105713

(Alameda County
Super. Ct. No. C8432087)

Plaintiff appeals from a trial court order sustaining the City of Oakland's demurrer to all five causes of action in plaintiff's second amended complaint, largely on statute of limitations grounds. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On July 9, 2001, appellant and plaintiff Loli Victoria Wang filed a complaint in the superior court for Alameda County against the City of Oakland and the Government of Communist China. The complaint alleged numerous murder attempts by agents of defendant China and alleged that two City of Oakland police officers kidnapped and attempted to murder plaintiff with poison gas on June 2, 1999. Plaintiff filed an amended complaint on August 20, 2001, containing the same basic allegations.

On September 23, 2003, defendant City of Oakland filed a motion for judgment on the pleadings. Before the hearing on the motion, plaintiff moved to amend the complaint; the motion to amend was granted and the second amended complaint was filed on

October 27, 2003. The second amended complaint named City of Oakland Mayor Jerry Brown as a defendant and specified five causes of action against the defendants. The first cause of action alleges that Brown falsely imprisoned the plaintiff between 1993 and 1996, and that Brown attempted to poison plaintiff with carbon monoxide gas on February 2, 1999. The second cause of action alleges that Brown conspired with defendant China to poison plaintiff with carbon monoxide gas on February 3, 1999. The third cause of action alleges that defendant Brown, the Oakland Police, and defendant China conspired to murder plaintiff by poisoning her soy milk on April 11, 1999. The fourth cause of action alleges that two Oakland police officers kidnapped plaintiff on June 2, 1999 and attempted to kill her with poison gas at a hospital. The fifth cause of action alleges that defendant Brown, the Oakland Police, and defendant China conspired to hire two men to kill plaintiff and conspired with the owners of two hotels where plaintiff resided to attempt to kill her on various dates in 2002 and 2003.

The City of Oakland demurred to the second amended complaint. In January 2004, the trial court sustained the demurrers to all five causes of action without leave to amend and dismissed the City of Oakland from the case. The trial court sustained the demurrers to the first through fourth causes of action “as barred by the statute of limitations set forth in the version of Code of Civil Procedure section 340(3) applicable at the time Plaintiff filed her complaint on July 9, 2001.”¹ The trial court sustained the demurrer to the fifth cause of action “because the events alleged do not relate back to the original complaint. To the extent that Plaintiff’s claims are based on events that allegedly occurred prior to July 9, 2001, they are barred by the statute of limitations. To the extent that Plaintiff’s claims are based on events that allegedly occurred after July 9, 2001, they are improperly included in the Second Amended Complaint.”

In denying plaintiff’s motion for reconsideration, the trial court stated, “Plaintiff is correct that under current law, the statute of limitations for personal injury actions is two years, pursuant to [] section 335.1. However, [] section 335.1 was not enacted until 2002.

¹ All further statutory references are to the Code of Civil Procedure.

At the time that Plaintiff filed her complaint on July 9, 2001, the statute of limitations for Plaintiff's claims was one year, pursuant to the version of [] section 340(3) applicable at that time." This appeal followed.²

DISCUSSION

I. *Plaintiff's First Through Fourth Causes of Action*

The trial court concluded that plaintiff's first through fourth causes of action against the City of Oakland are untimely. Plaintiff contends that the trial court erred in applying a one-year statute of limitations and in failing to excuse any untimeliness under sections 357 and 360.5. We conclude that plaintiff's first through fourth causes of action are untimely.

Plaintiff contends that the two-year statute of limitations specified in section 335.1 is applicable to her causes of action. Section 335.1, which was added by the Legislature in 2002, applies to actions for "assault, battery, or injury to . . . an individual caused by the wrongful act or neglect of another." The trial court instead applied the one year limit applicable to such actions specified in section 340, former subdivision (3), which was in effect at the time plaintiff filed her original complaint.³ We need not conclude whether the one- or two-year limit is applicable. Plaintiff's causes of action against the City of Oakland are barred regardless of which limit applies because her claims are based on incidents occurring more than two years before the complaint was filed on July 9, 2001. In particular, the first cause of action alleges false imprisonment between 1993 and 1996

² We note that plaintiff purports to appeal from an unappealable order. An order sustaining a demurrer is interlocutory and not appealable. (*Forsyth v. Jones* (1997) 57 Cal.App.4th 776, 780.) The appeal must be taken from a subsequent judgment of dismissal. (*Ibid.*) However, the appeal has been fully briefed by both parties. In the interests of justice and to prevent unnecessary delay, we deem the order sustaining the demurrer as incorporating a judgment of dismissal and treat plaintiff's notice of appeal as applying to that judgment. (*Nowlon v. Koram Ins. Center, Inc.* (1991) 1 Cal.App.4th 1437, 1440-1441.)

³ Plaintiff mistakenly asserts that the trial court applied the statute of limitations in section 340.3, applicable to actions arising from felony offenses.

and an attempted poisoning on February 2, 1999; the second cause of action alleges an attempted poisoning on February 3, 1999; the third cause of action alleges an attempted poisoning on April 11, 1999; and the fourth cause of action alleges a kidnapping and attempted poisoning on June 2, 1999.

We reject plaintiff's argument that her failure to file a timely action is excused under section 357. Section 357 states that "[n]o person can avail himself of a disability, unless it existed when his right of action accrued." That section does not itself excuse a failure to file a timely action; instead it is section 352 which provides for tolling of the limitations period where at the time the action accrued the plaintiff suffered from the disability of minority status or insanity. "For purposes of [] section 352, a plaintiff is 'insane' if 'incapable of caring for his [or her] property or transacting business or understanding the nature or effects of his [or her] acts'" (*Alcott Rehabilitation Hospital v. Superior Court* (2001) 93 Cal.App.4th 94, 101.) Plaintiff contends that during the critical period she was suffering emotionally and physically and was disabled within the Social Security Administration definition of disability, but does not contend that she was literally incapable of transacting business or understanding the nature of her actions. In the absence of any such contention, plaintiff's failure to file a timely complaint cannot be excused under section 352.

We also reject plaintiff's argument that her failure to file a timely action is excused under section 360.5, which relates to a defendant's waiver of the limitations period. Section 360.5 provides that "[n]o waiver shall bar a defense to any action that the action was not commenced within the time limited by this title unless the waiver is in writing and signed by the person obligated." Plaintiff admits that the City of Oakland did not respond to her request for waiver of the limitations period. Thus, there was no waiver sufficient to satisfy section 360.5.

The trial court properly sustained the City of Oakland's demurrer to the first through fourth causes of action.

II. *Plaintiff's Fifth Cause of Action*

Plaintiff's fifth cause of action alleges that defendant Brown, the Oakland Police, and defendant China conspired to hire two men to kill plaintiff and conspired with the owners of two hotels where plaintiff resided to attempt to kill her on various dates in 2002 and 2003. In sustaining the demurrer to the fifth cause of action, the trial court concluded that the allegations do not relate back to the original complaint and that "[t]o the extent that Plaintiff's claims are based on events that allegedly occurred prior to July 9, 2001, they are barred by the statute of limitations. To the extent that Plaintiff's claims are based on events that allegedly occurred after July 9, 2001, they are improperly included in the Second Amended Complaint." We address separately the allegations regarding the 2002 and 2003 murder attempts and the plot to hire two men to kill plaintiff.

In regard to the 2002 and 2003 alleged murder attempts, "[m]atters which occur after the filing of a complaint may not be alleged by amendment to the complaint, but must be brought into the action by means of a supplemental complaint. [Citations.] The filing of a supplemental complaint requires a noticed motion. [Citations.]" (*Herbert v. Los Angeles Raiders, Ltd.* (1991) 23 Cal.App.4th 414, 426.) Plaintiff did not move for leave to file a supplemental complaint. Thus, the allegations regarding events in 2002 and 2003 were not proper amendments to the complaint and the trial court properly sustained the demurrer on that ground.

In regard to the conspiracy to hire two men to murder plaintiff, the second amended complaint does not specify when the alleged conspiracy took place. The complaint indicates generally that the acts alleged in the cause of action occurred "from 7/1/99 to 10/2003." To the extent the alleged conspiracy occurred after the filing of the original complaint on July 9, 2001, the allegations are improper amendments to the complaint. To the extent the alleged conspiracy occurred before July 9, 2001, the action is untimely. This is because the allegations, first made in the October 2003 second amended complaint, do not relate back to the first complaint for statute of limitations purposes. "An amendment filed after the statute of limitations has run will be deemed

filed as of the date of the original complaint ‘provided recovery is sought in both pleadings on the same general set of facts.’ [Citation.] A newly pled cause of action rests upon the same facts when it involves the same accident and the same offending instrumentality. [Citation.]” (*Kim v. Regents of University of California* (2000) 80 Cal.App.4th 160, 168.) The original complaint alleged specific murder attempts by agents of defendant China and a kidnapping and murder attempt by the Oakland Police, not a murder plot involving the two men identified in the second amended complaint. Thus, to the extent the conspiracy alleged in the fifth cause of action took place before July 9, 2001 (more than two years before the October 2003 filing of the second amended complaint), it was untimely. The trial court properly sustained the demurrer to the fifth cause of action.

DISPOSITION

The judgment of dismissal is affirmed. Defendant City of Oakland is awarded its costs on appeal.

GEMELLO, J.

We concur.

STEVENS, ACTING P. J.

SIMONS, J.